

OVERVIEW OF BARGAINING UNIT EXCLUSIONS
MANAGEMENT OFFICIAL
5 U.S.C. § 7103(a)(11)

In General

A management official is an individual, generally above the supervisory level who:

formulates
determines
or independently influences the policies of an agency

Determining Factor: **Whether that individual's work is or is not subject to higher level review or approval.**

To qualify as a management official, the individual's duties and responsibilities must extend to the point of active participation in the ultimate determination of agency policy.

In contrast, an expert or highly skilled professional either drafts or recommends policy, or a specific course of action for the agency. Such experts and skilled professionals are generally included in the bargaining unit.

Examples

A General Engineer was held not to be a manager because, as a professional, he assisted in implementing rather than shaping the agency's policies.

An Assistant Research Director was a management official since he made independent decisions, planned research projects and monitored projects by evaluating reports. His recommendations and findings were accepted as authoritative and implemented without any meaningful review.

An ADP Manager who set standards and policies regarding the installation and removal of equipment, could independently expend agency funds and shut down all computer operations, was a management official.

Individuals who recommended new regulations, reviewed legislative proposals and analyzed the impact of economic data were not management officials.

OVERVIEW OF BARGAINING UNIT EXCLUSIONS

Supervisor 5 U.S.C. § 7103(a) 10

In General

This is an individual who possesses and **exercises** one or more of the following indicators of supervisory authority:

hires employees
promotes employees
independently assigns and reassigns work
evaluates, rewards or disciplines employees
adjusts employee grievances
grants time off the job

Independent Judgement Required

Supervisory status depends upon the actual duties performed rather than title. Position descriptions are of little value. The key is establishing that the individual exercises independent judgement on a consistent basis. An individual need not exercise all of the above powers in order to justify his or her exclusion from the unit as a supervisor.

Job Title Not Controlling

Examples:

An individual holding the title Supervisory Personnel Specialist was not a supervisor, since he lacked the authority to recommend selection of job applicants and did not determine the hours of work of personnel assistants.

An individual holding the title Information Specialist was determined to be a supervisor since her recommendations that employees receive awards were consistently acted upon.

Infrequent Exercise or Supervisory Authority Not Controlling

The fact that an individual exercises independent judgement infrequently does not alter or lessen one's supervisory status. Possession of any one of the supervisory indicators above, regardless of frequency of use, is sufficient to support supervisory status.

Example: Foremen of first and second shifts shared supervisory duties yet both qualified as supervisors.

Duties Must be More Than Routine or Clerical in Nature

An individual with the authority mentioned above must exercise it in a way which is more than routine or clerical. Work assignments made on a repetitive basis or in accordance with strict guidelines do not involve the exercise of independent judgement.

Example: An individual holding the title of Team Leader is not a supervisor because his assignment of work to a Loan Specialist was routine in character and input into a Specialist's performance appraisal did not reflect independent judgement.

OVERVIEW OF BARGAINING UNIT EXCLUSIONS
CONFIDENTIAL EMPLOYEE
5 U.S.C. § 7103(a)(13)

In General

This is an individual who formulates, participates in, or directly supports the agency's Labor-Management Relations Program.

The fact that an individual is privy to confidential budget data, management's strategic plans or other "trade secrets" is not relevant.

In most instances, a "confidential" employee will have advance knowledge of management's positions or strategies on union-management issues.

Employees In A Variety of Positions May Qualify As Confidentials

Managers and Professionals: There are several different ways one can qualify as a confidential. First, employees who "formulate or effectuate" labor relations policy are confidentials. For example, managers or professionals who negotiate directly with the union, respond to grievances, hold meetings with union officials, supply data to assist management negotiators or make written comments on management proposals are confidentials. A professional who has provided cost analysis used in labor negotiations (budget) or helped to formulate management's position on other negotiable items (day care, cafeteria, leasing or contracting staffs) may be excluded. Such individuals may qualify as confidentials.

Support Staff: Support Staff (secretaries, clerks, assistants, etc.) may qualify as confidentials. For confidential status, the support person must meet **two** tests: they must work extremely closely with their boss **and** their boss must be someone involved in union-management relations issues. A secretary who types grievance responses or memoranda to labor specialists or labor attorneys on union issues would likely qualify. Advance knowledge is critical. The mere fact that someone collates, files or has access to labor-management documents is not enough.

Key Points

A confidential employee has knowledge of management's position on a grievance, bargaining strategy or other initiative before the information is known by other employees or the union.

Position Descriptions (PDs) do not count for much. What is important is what the employee actually does day to day.

Current duties control (not duties the employee may perform in the future).

Examples:

Secretaries who type grievance responses and attend meetings where labor relations strategies are discussed are confidentials.

Analysts who perform studies and prepare analysis used by management negotiators are confidentials.

Attorneys who handle cases involving union-management relations issues are confidentials.

SIGNIFICANT FLRA CASE DECISIONS
MANAGEMENT OFFICIAL
5 U.S.C. § 7103(a)(11)

Key Factor to be considered: Whether the individual's work is subject to higher level review or approval. *Dept of Agric., Food and Nutrition Service and NTEU, 34 FLRA 143, 147 (1990)*

Examples

Immigration Judges are not management officials within the meaning of section 7103(a)(11). Immigration Judges are appointed by the Attorney General for the purpose of conducting formal, quasi-judicial proceedings involving the rights of aliens to enter or remain in the United States. They are required to apply immigration laws and regulations. Additionally, their decisions are not published and do not constitute precedent. *DOJ, EOIR, Office of Immigration Judge and Nat'l Assoc of Immigration Judges, 56 FLRA 97 (2000)*

The management official exclusion is not linked to an individual's job title, but turns upon the specific duties performed. In one case, auditors and electronic engineers qualified as management officials. *Department of the Army, Army Communications Command, 4 FLRA 627 (1993)*

Grade 13 and 14 senior Contracting Officers did not qualify as management officials. Although they had a high level of responsibility, they were guided by the Federal Acquisition Regulations (FAR) and a variety of agency policies in carrying out their duties. They did not independently establish or influence agency policies. *Defense Logistics Agency, 48 FLRA 285 (1993)*

An Attorney - Examiner/Board member of the Board of Immigration Appeals is a management official. The Board of Immigration Appeals (Board) is a "quasi-judicial organization" which function(s) as an administrative appellate body on behalf of the Attorney General. It reviews administrative decisions of Immigration Judges and District Directors of the Immigration and Naturalization Service (INS). The Board issues binding "administrative decisions which interpret the immigration laws and establish precedent". *AFGE, Local 3525 and Justice, Board of Immigration Appeals, 47 FLRA 505 (1993)*

Three Schedule C employees were excluded from the bargaining unit on the basis that they did not share a community of interest with other employees. Their RIF, drug test, security and other working conditions were different. *HUD, Washington, DC, 41 FLRA 1226 (1991)*

GM-15 attorneys in the Finance Section of the Office of the Assistant General Counsel for Procurement and Finance are considered management officials. Attorneys in the finance section have full signatory authority concerning financial and energy matters, and serve as legal advisors on task forces. Their decisions influence policy by creating and bringing about Agency policy determinations. *NTEU and DOE, 40 FLRA 264 (1991)*

An ADP Security Specialist was excluded from the bargaining unit as a management official. He had independently created the activity's computer security programs and retained the right to shut down all computer operations in the event of a security breach. *Environmental Protection Agency, Research Triangle park, 12 FLRA 358 (1983)*

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A GS-15 Management Analyst did not qualify as a management official. He was responsible for drafting a five-year plan for the organization as well as developing an internal procedure manual. However, the incumbent did not possess independent authority in these areas. *General Services Administration 8 FLRA 333 (1982)*

The test to qualify as a management official is a stringent one. The individual must do more than carry out high level agency policies. He or she must "formulate, determine or influence" such policies. *Department of the Navy ADP Selection Office 7 FLRA 172 (1981)*

A GS-15 Electronic Engineer, serving as the technical director for the activity and a member of the activity "command group" responsible for the oversight of civilian personnel career planning, was considered a management official. *Army Communications System Agency, Ft. Monmouth, NJ and NFFE Local 476, 4 FLRA 627, 628-29 (1980)*

SIGNIFICANT FLRA CASE DECISIONS

Supervisor

5 U.S.C. § 7103(a)(10)

Key factor to be considered: Does the employee exercise authority to hire, promote, or independently assign work? Does he/she exercise independent judgment on a consistent basis? *AAFES Base Exchange, Ft Carson and AFGE Local 1345, 3 FLRA 596 (1980)*

Examples

A team leader in the Portfolio Management group is found not to be a supervisor. Although he assigns the work, and sets work priorities for other loan specialist, these duties were routine and based upon his “senior” status. He reviewed the work of the other loan specialist to determine if the work complied with the Standard Operating Procedures (SOP) and SBA policy. *Solidarity, USA and SBA District Office, 49 FLRA 1051 (1994)*

Arbitrator James Harkless found a grievance non-arbitrable which concerned the manner for filling two supervisory positions. The arbitrator relied upon the fact that supervisory positions were excluded from the bargaining unit. *NFFE 1442 and Letterkenny Army Depot, 110 LRRP 15185 (2/10/10)*

An excellent example of the distinction between a work leader and supervisor. *Social Security Administration, 60 FLRA 57 (2004)*

11 of 12 position were found to be supervisory. *Department of Energy, Western Area Power Administration, 60 FLRA 57 (2004)*

The Authority found Mr. Carr, a Homeliving Specialist, to be a supervisor. His responsibilities for overseeing dormitory operations included planning, organizing, implementing and evaluating the School’s guidance programs and identifying and resolving dormitory problems. Mr. Carr also exercised independent judgment in evaluating employee performance, which upper level management relied on in taking action. *AFT, National Council of BIA, and Dept of Interior, 45 FLRA 646 (1992)*

A GS-7 Forestry Technician was found to be a supervisor. His new duties will include rating employee performance, approving leave, and preparing individual development plans. *NFFE, USDA, and Forest Service, 43 FLRA 911 (1991)*

Five of seven GM-14 Aerospace or Electronics Engineers are excluded from the bargaining unit. Each individual is in a team leader position. They all assign work, direct employees, exercise independent judgment, and effectively recommend the full range of personnel actions. *NFFE, Local 405 and Army, AVSCOM, 36 FLRA 587 (1990)*

An individual must supervise federal civilian employees in order to qualify for the supervisory exclusion. Because of the unique nature of the National Guard, some members supervise only military personnel. They do not qualify as “supervisors” based upon these duties. *ACT*

and Army, TAG 11 FLRA 66 (1983)

A work leader or team leader may fail to qualify for the supervisory exclusion because of a lack of independent judgement and authority. A leader who functioned in a “senior” capacity, and planned work assignments in conjunction with other team members, was not a supervisor. NFFE, Local 34 and USDA, Forest Service, 10 FLRA 682 (1982)

A first and second shift Foreman who “shared supervisory” duties were found to be supervisors. Both Foremen approved leave, had authority to discipline, were responsible for evaluating employees, and recommended the hiring of new employees. *AFGE, Local 933 and VA Medical Center, 35 FLRA 1206 (1990)*

SIGNIFICANT FLRA CASE DECISIONS
CONFIDENTIAL EMPLOYEE
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Key factor to be considered: Does the individual carry out duties and responsibilities in the Labor & Employment Relations area, or directly support someone who does? *NFFE, Local 1487 and Interior, Bureau of Reclamation, YUMA Projects Office, AZ, 37 FLRA 239 (1990)*

Examples

Four administrative officers did not qualify as confidential employees. *Department of Veterans Affairs, Hampton, VA*, 64 FLRA No. 62.

Two public affairs specialists may well have had a confidential relationship with their supervisor. However, the supervisor played no significant role in union-management relations. They employees did not qualify for the confidential exclusion. *Broadcasting Board of Governors*, 64 FLRA 235

The Regional Director found that an employee was not a confidential. She then refused to consider an alternative argument that the employee was engaged in audit/investigation functions. This argument was not raised at the hearing. *Department of Veterans Affairs Hampton, VA*, 63 FLRA 593.

A training manager qualified as a confidential. She had a confidential relationship with her supervisor who was directly involved in labor-management relations. *Department of the Air Forced, Edwards AFB*, 62 FLRA 159

Reminder: support staff must meet a **two** part test to qualify as a confidential. First, there must be a confidential working relationship between the employee and their supervisor; and second, the supervisor must be significantly involved in labor-management relations. The office automation clerk in this case was included in the bargaining unit because she didn't meet the second part of the test. The mere fact that she had a confidential working relationship with her supervisor was not enough. *AFGE, Local 2571 and Department of Veterans Affairs, Regional Office*, 50 FLRA 109 (1995)

Secretaries to first line supervisors in FDA, Newark are not confidential employees because the first level supervisors are not significantly involved in formulating or effectuating labor-management policy. However, secretaries to Branch Chiefs and the District Director did qualify as confidentials. *AFGE, Council 242 and HHS, U.S. FDA, Northeast and Mid-Atlantic Regions*, 48 FLRA 1008 (1993)

Split decision! Three out of Five support staffers are "confidential" employees and are excluded from the unit. The three secretaries are each assigned to Deputy Associate General Counsels (DAGCs). They provide the sole source of administrative and clerical support. If was found that the DAGC's effectuate management policies in the field of labor-management relations, handle grievances, and are consulted by the activity regarding proposed collective bargaining agreement provisions. *AFGE, Local 1923 and HHS, Office of the General Counsel*, 45 FLRA 894 (1992)

Schedule C political (appointees) functioning as special assistants were neither confidential nor management officials. Nevertheless, they were excluded from the bargaining unit because they lacked a community of interest with others. *HUD, HQ and AFGE Local 476*, 41 FLRA 1226 (1991)

The Lead Legal Technician in the Office of Administrative Law Judges is not a confidential employee and is included in the bargaining unit. Although there was a confidential working relationship between the Legal Technician and District Chief Judge, the two part test wasn't met. The Judge was not significantly involved in "formulating or effectuating management policies in the field of labor-management relations." *AFGE, National Council of Field Labor, Local 644 and Labor, Office Administrative Law Judges, PA 40 FLRA 1021 (1991)*

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A GS-12 management analyst was excluded from the bargaining unit as a confidential employee. She had been involved in projects directly supporting the management collective bargaining team and dealt with union representatives on a daily basis. *General Services Administration, 8 FLRA 333 (1982)*